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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 262.

JOSEPH NAPLES,
Petitioner,

vs.

E. L. MAXWELL,
Warden, Ohio State Penitentiary,
Respondent.

PETITION FOR REHEARING OF THE ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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Petitioner, Joseph Naples, respectfully prays, that pursuant to paragraph 2 of Rule 58 of the revised rules of this Honorable Court, a rehearing be granted of the order of this Honorable Court, entered in this case on February 24, 1969, denying the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Petitioner respectfully shows as follows:

The Court of Appeals misread the affidavit in determining probable cause.

The Court of Appeals in its opinion, *Naples v. Maxwell,* 393 F. 2nd 615, stated that:

> "The statement (in the affidavit) that Brace (the affiant) believed, and had cause to believe, that gambling equipment, guns, narcotics, explosives, gambling records and monetary proceeds, stolen goods and contraband were in the Naples residence was based

> **upon his own knowledge of previous searches of the house of Naples and one of his brothers."** (Emphasis added.)

That statement by the Court of Appeals is contrary to the affidavit for the search warrant signed by Brace which states:

> "The affiant (Brace) **has received information which he believes to be reliable and true** that the above-named items, or a part thereof, are being unlawfully kept on said premises * * *." (Emphasis added.)

The above error of the Court of Appeals in going beyond the affidavit to sustain it violates the rule set out in *Aguilar v. Texas,* 378 U.S. 108, that the "reviewing court may consider **only** information brought to the magistrate's attention." (Emphasis added.)

This Honorable Court said in *Spinelli v. United States of America,* October Term, 1968, No. 8, 37 L.W. 4110, 4111:

> "Believing it desirable that the principles of *Aguilar* should be further explicated, we granted certiorari, 390 U. S. 942, our writ being later limited to the question of the constitutional validity of the search and seizure. ____ U. S. ____. For reasons that follow we reverse.
>
> "In *Aguilar,* a search warrant had issued upon an affidavit of police officers who swore only that they had 'received reliable information from a credible person and do believe' that narcotics were being illegally stored on the described premises. While recognizing that the constitutional requirement of probable cause can be satisfied by hearsay information, this Court held the affidavit inadequate for two reasons. First, the application failed to set forth any of the 'underlying circumstances' necessary to enable the magistrate independently to judge of the validity of the in-

formant's conclusion that the narcotics were where he said they were. Second, the affiant-officers did not attempt to support their claim that their informant was 'credible' or his information 'reliable.' "

In the light of *Spinelli v. United States of America,* decided by this Honorable Court on January 27, 1969, the affidavit in our present case does not seem to measure up to the standards set by this Honorable Court.

The only item in the affidavit with substance is that part added by the magistrate:

"Admitted to officers that he is a part of the Naples gambling operation."

But nothing appears in the affidavit as to the time that statement was given to the officers. (During the trial of the case in Common Pleas Court, the time given for the alleged statement was about a month before the affidavit for search warrant.)

Probable cause must exist at the time it is sought to make the search. *Segro v. United States of America,* 287 U.S. 206, 211:

"* * * warrant must rest upon a proper finding and statement by the commissioner that probable cause **then exists.** That determination, as of that time, cannot **be left to mere inference or conjecture."** (Emphasis added.)

It is not enough to base probable cause on the fact that sometime in the past there existed circumstances that would have justified a search, or that searches in the past would justify a present search. *Schoeneman v. United States of America,* 317 F. 2nd 173 (1963).

The affidavit in this present case was executed to obtain a search warrant for a private residence (605 Carlotta Drive). Not one scintilla of evidence was presented to the magistrate that any gambling activity or any other ac-

tivity or activities were taking place at or near this residence.

This Honorable Court stated in *Recznik v. City of Lorain*, 21 L. Ed. 2d 317, 321, November 18, 1968:

> "We have held that the prosecution has not met its burden when the arresting officers 'said no more than that someone (he did not say who) had told him something (he did not say what) about the petitioner.' *Beck v. Ohio*, 379 US 89, 97, 13 L Ed 2d 142, 148, 85 S Ct 223. Even where a search warrant is obtained, the police must show a basis for the search beyond the mere fact of an assertion by an informer. *Aguilar v. Texas*, 378 US 108, 12 L Ed 2d 723, 84 S Ct 1509."

CONCLUSION.

For the substantial reasons set forth in this petition, the petitioner prays that a rehearing be granted in this case.

Respectfully submitted,

DAN W. DUFFY,
JOHN J. KANE, JR.,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58, Rules of the Supreme Court of the United States, effective October 2, 1967.

DAN W. DUFFY,
Attorney.